RECENT CASES

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — DIVISION OF COURT. — On appeal from a conviction of murder in the second degree, two judges favored affirmance, and the other three held that the conviction should be set aside. Of these three, two held the refusal of one instruction erroneous, while the third joined with one of these two in holding a certain instruction bad, and was alone in thinking the refusal of another instruction error. Only two of the three, however, voted to remand the case for a new trial, for the other voted for a reduction of the degree of the offense to manslaughter. Hence on no one assignment of error was a majority of the court for reversal. *Held*, that the judgment be set aside and that the cause be remanded for new trial unless the state elect to stand on a conviction for manslaughter. *Price* v. *State*, 170 S. W. 235 (Ark.).

Where an appeal arises on a single assignment of error and a majority of the court is for reversal but for different reasons, it is properly held that there should be a reversal. *Browning* v. *State*, 33 Miss. 47, 87; *Oakley* v. *Aspinwall*, 1 Duer (N. Y.) 1. Even where the appeal is on several assignments of error and a majority upholds each assignment, but the minority on the separate assignments unite on the vote for reversal and become a majority, it has been held that there should be a reversal. *Smith* v. *United States*, 5 Pet. (U. S.) 292. See 22 HARV. L. REV. 533. This result seems to be required by logic, so long as the judges vote on the general question of reversal rather than separately on each specific assignment of error. It is obvious, however, as a matter of practice, that a new trial is futile when a majority of the appellate court has sustained the trial court on every point. On this ground, some courts have held, even apart from statute, that there should be no reversal. *In re McNaughton's Will*, 138 Wis. 179, 118 N. W. 997, 1001. See *Legal Tender Cases*, 52 Pa. 9, 101. Statutes requiring a separate vote on each assignment of error lead to this same result in other states. See MD., PUB. GEN. LAWS, Art. 5, §§ 4, 9; *cf. Matthews* v. *American Central Ins. Co.*, 154 N. Y. 449, 48 N. E. 751. In the principal case, therefore, unless the compromise reached was demanded by local practice, it would seem that an affirmance might have been justifiable.

BILLS AND NOTES — STATUTES — NEGOTIABLE INSTRUMENTS LAW: EFFECT ON STATUTE MAKING USURIOUS NOTES VOID. — A statute declared void all notes given for usurious consideration. Sections 55 and 57 of the uniform Negotiable Instruments Law, subsequently adopted, provide that the title of a person who negotiates an instrument is defective when obtained for an illegal consideration, but that a holder in due course holds the instrument free from such defects. The plaintiff was an innocent holder for value of a note given for usurious consideration. *Held*, that the plaintiff can recover. *Emanuel* v. *Misicki*, 149 N. Y. Supp. 905 (Sup. Ct.).

The principal case is additional authority to the effect that the Negotiable Instruments Law repeals by implication previous statutes making void instruments obtained in illegal transactions. *Wirt* v. *Stubblefield*, 17 App. D. C. 283; *Klar* v. *Kostiuk*, 65 N. Y. Misc. 199, 119 N. Y. Supp. 683. But there is much authority, including a late Iowa case, to the contrary, and this attitude seems much preferable, for the reason that a clear provision for repeal should be necessary to abrogate the previous statute. *Penny Savings Bank* v. *Fitzgerald*, 149 N. W. 497 (Ia.); *Alexander* v. *Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Crusins* v. *Siegman*, 81 N. Y. Misc. 367, 142 N. Y. Supp. 348; *Martin* v. *Hess*, 71 Leg. Intell. 148 (Phila. Munic. Ct.). Furthermore, it is difficult to see how

the provisions of the Negotiable Instruments Law have any application, for when a statute makes the instrument void from its inception, the case is properly not one of defective title, but one where no negotiable instrument ever came into legal existence. See 27 HARV. L. REV. 679.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — JUDICIAL SEPARATION IN ENGLAND. — An Englishwoman was married to a Spaniard in England. After several years of foreign residence she returned, and at a time when her husband was also in England she filed a petition for judicial separation based on adultery. The husband defended on the ground that his domicile was in Spain. *Held*, that the English court has power to grant the relief. *Riera* v. *Riera*, 138 L. T. J. 37 (Prob. Div.).

A rather sharp divergence between America and England has come about on the problem whether divorce can be granted the wife by any jurisdiction except that of the husband's domicile. By the prevailing American rule the wife may acquire a separate domicile for the purpose of securing divorce if the conduct of the husband has been such as to justify her action. *Ditson* v. *Ditson*, 4 R. I. 87. See 15 HARV. L. REV. 66, 28 *id.* 196. But the English courts have adhered to the principle that an actual change in the marriage status can be effected only at the domicile of the husband. See 26 HARV. L. REV. 447. Even in England, however, a deserted wife is allowed to sue at the last previous matrimonial domicile, so as to prevent the husband from asserting his changed domicile for the purpose of profiting by his own wrong. *Deck* v. *Deck*, 2 Sw. & Tr. 90. And it was further established in a celebrated case that an English court may grant to the wife a judicial separation to protect her from the cruelty of her husband, even though his domicile is foreign. *Armytage* v. *Armytage*, [1898] Prob. 178. This was regarded not as a decree that would in any way affect the marriage status, but rather as a manifestation of the inherent right of the sovereign to bestow personal protection on those within its territory. The principal case seems clearly right in extending this relief to adultery, for it should be open to give needed protection against all abuses of the personal relation between the parties.

CONSTITUTIONAL LAW — PRIVILEGES, IMMUNITIES, AND CLASS LEGISLATION — PERSONAL DISCRIMINATION: JIM CROW STATUTES. — The Oklahoma Separate Coach Law permitted railroads to haul sleeping cars, dining cars, and chair cars for white passengers without providing like accommodations for negroes. In a suit for an injunction to restrain the defendant railroads from furnishing such cars for white passengers only, it was shown that there was no sufficient demand to warrant the railroads in supplying separate Pullmans for negroes. *Held*, that the bill be dismissed as too vague for equitable relief. But the majority of the court intimated that in a proper action the statute would be held unconstitutional. *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.

For a discussion of this new phase of the Jim Crow question which the Supreme Court here considered, see NOTES, p. 417.

CONSTITUTIONAL LAW — TRIAL BY JURY — TRIAL OF CIVIL OFFENDER BY MILITARY COMMISSION. — The governor of Montana declared martial law in a district where rioting was prevalent. The relator was arrested on the charge of resisting an officer and tried and sentenced by a military commission. He sued out a writ of *habeas corpus*. *Held*, that the relator be remanded to await trial before a legally constituted civil tribunal. *Ex parte McDonald*, *In re Gillis*, 143 Pac. 947 (Mont.).

For a discussion of the principles involved, see NOTES, p. 415.